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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE, *et al.*,
Appellants,
v.
NICK THEODORE, *et al.*,
Appellees.

CARROLL A. CAMPBELL, JR.,
GOVERNOR OF SOUTH CAROLINA,
Appellant,
v.
NICK THEODORE, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of South Carolina

SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF OF THE UNITED STATES

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Pursuant to Sup. Ct. R. 18.9, Appellee South Carolina State Senate ("Senate") files this supplemental brief to address the recently filed *amicus curiae* brief of the United States ("U.S. Br.").

1. At the outset, the Senate notes that the United States concedes several key points made in the Senate's Motion to Dismiss or Affirm ("Sen. Br."):

a. The Senate pointed out in its opening brief that all the parties stipulated that the existing districting plans (*i.e.*, those developed after the 1980 census) violated the one person, one vote rule. Sen. Br. at 4-5. The United States agrees with the Senate that, in light of this stipulation, there was no need for the court to consider the additional claim of the Statewide Reapportionment Advisory Committee ("SRAC") that they violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. U.S. Br. at 9-10. Rather, the three-judge court "properly focused on the nature of the new plans that should be put in place." *Id.* at 10. This concession is significant, because the SRAC has argued that the existing plans violated Section 2 and the court therefore had the obligation to remedy this violation by drawing more districts with black majorities.

b. The United States also agrees that, when the three-judge court decided on new redistricting plans, "it was appropriate for the court to consider" the principles contained in Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, which prohibits changes in election law that have the purpose or effect of denying or abridging voting rights on account of race. *Id.* at 10.

c. The United States does not address the three-judge court's treatment of the Section 5 issues, but rather limits its brief to the lower court's application of Section 2. On this latter issue, the United States (like the Senate) "agree[s] with the court below that the three 'necessary preconditions' identified in [*Thornburg* v.] *Gingles*, 478 U.S. [30,] 50-51 [(1986)], are 'threshold requirements' for imposing a Section 2 remedy." *Id.* at 12 n. 9.[1] Furthermore,

[1] These preconditions are (1) that the minority group must be sufficiently numerous and compact to constitute a majority in a single-member district; (2) that the minority group must be politically cohesive; and (3) that the group's preferred candidates must usually lose elections because of bloc voting by whites. *Gingles*, 478 U.S. at 50-51.

the United States (again, like the Senate) states that, if these three preconditions are not satisfied, a district court need not engage in any further analysis. *Id.* at 12. *See generally INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("As a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach.").

d. With respect to the issue of the existence of racially polarized voting, which subsumes two of the three *Gingles* preconditions (minority political cohesiveness and white bloc voting), U.S. Br. at 12 n.8, the United States "agree[s] with the Senate appellees that evidence of racial polarization or other factors would have to be more localized and specific to support creating or rejecting a challenged electoral district on Section 2 grounds." *Id.* at 13.[2]

e. Finally, the United States agrees with the Senate that the three-judge court had the right to order use of its plans for the 1992 elections because of the time pressure it faced. *Id.* at 11, 18.

2. The Senate parts company with the United States, however, on the question of whether the three-judge court's plans should be used for future elections. The United States argues that they should not. In doing so, it relies on some (but not all) of the arguments raised by Appellants.

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[2] The United States goes on, however, to argue that the court failed to make "specific findings rejecting the evidence of polarization in particular districts." *Id.* The Senate addresses this argument in Point 2.a., *infra*. As to the remaining *Gingles* precondition (compactness), the United States argues that the three-judge court "did not respond adequately to the question whether additional compact and contiguous districts with black majorities could and should have been created." U.S. Br. at 13. The supposed flaws in the three-judge court's treatment of this question, however, appear to the United States to be the court's failure to determine the extent of racially polarized voting and its allegedly undue deference to the State's policy of preserving county lines in districting. *Id.* at 14-18. The Senate discusses these issues in Points 2.b.-2.d., *infra*.

The United States does not argue for the creation of additional black majority districts or subscribe to the SRAC's position that Section 2 requires maximization of minority voting strength.[3] Instead, the United States's brief focuses primarily on the argument (also made by the SRAC and the Governor) that the three-judge court failed to give adequate consideration to the requirements of Section 2. The Senate discussed this argument in some detail in its Motion to Dismiss or Affirm, Sen. Br. at 13-17, and will not reiterate its position at length, but rather will attempt to respond to the flaws in the *amicus* brief.

a. The United States argues that "the district court explicitly refused to resolve the issue of polarized voting," U.S. Br. at 13, citing the court's statement that " 'the extent to which voting is polarized in South Carolina remains an open question.' " *Id.* (quoting SRAC J.S. App. 56). To say that the existence of racial bloc voting is an open question is not, as the United States claims, tantamount to refusing to decide the issue. Rather, given that the burden of proof was on those seeking to justify the creation of additional black majority districts, *Gingles*, 478 U.S. at 50-51, and the extensive (if unpersuasive) evidence Appellants offered on this issue, the court's statement is tantamount to saying that these parties failed to meet their burden.

b. The United States contends that, because of what it views as the three-judge court's inadequate treatment of the polarized voting issue, "there was no basis for the court's finding that any district in which blacks constitute

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[3] *See* U.S. Br. at 9 ("We take no position at this time as to whether the redistricting plans adopted by the court would in fact violate Section 2 if applied to elections held subsequent to 1992."). As the Senate has noted, however, the Solicitor General has previously stated that "[n]othing in the Voting Rights Act requires state or local jurisdictions to maximize the number of majority-minority districts . . . ." Brief for the United States as Amicus Curiae Supporting Appellants at 12, *Voinovich v. Quilter*, No. 91-1618 (U.S. filed July 31, 1992).

more than 50% of the voting age population may be considered a 'black opportunity district.'" U.S. Br. at 14 (quoting SRAC J.S. App. 48). The court did not, however, simply adopt a 50% figure. Instead, it explicitly stated that it had considered other factors besides voting age population ("VAP"), such as the presence of an incumbent in a given district, in formulating the plans. Sen. Br. at 23.[4]

c. The United States similarly contends that the three-judge court gave short shrift to plaintiffs' argument that "a district should have a black *voting-age* population of at least 57% in order for black voters to have a realistic chance of electing their preferred candidates." U.S. Br. at 15 (emphasis added). In fact, the plaintiffs contended that a district had to have a *total* population that was more than 57% black to give black voters such an opportunity. Sen. Br. App. at 19a. The difference is a significant one, because a district with a 57% black total population will have a voting age population that is only 52-53% black—a figure strikingly close to the 50.1% figure for which the United States claims the court had no basis.

d. The United States argues that, in derogation of Section 2, the district court gave undue deference to the State's interest in drawing redistricting plans that preserved county lines. *See* U.S. Br. at 15-16. This argument completely ignores the Senate's contention that adherence to county lines is entirely consistent with Section 2. *See* Sen. Br. at 26-27.

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[4] The United States complains in a footnote that the three-judge court's consideration of these other factors was inadequate because it did not include a "particularized consideration of historical voting patterns, election results, or other data to support treating identified districts as 'black opportunity districts' in the face of plaintiffs' challenge to that characterization." U.S. Br. at 15 n.11. Plaintiffs' challenge, however, was not so much to the court's characterization of certain districts as black opportunity districts as it was to the court's failure to draw additional districts with black VAP majorities.

e. Summarizing its arguments, the United States contends that the three-judge court should have (i) "received and reviewed evidence concerning each challengd district," (ii) "considered that evidence in light of . . . *Gingles*," and (iii) made "specific, reviewable findings of fact and conclusions of law." U.S. Br. at 18. Each of these three claims is without merit.

First, the United States shares the parties' view that "the court had before it substantial evidence relevant to the factors identified in *Gingles* as probative of minority vote dilution in violation of Section 2." U.S. Br. at 12-13. Moreover, Appellants, who were represented by experienced counsel, had ample opportunities to offer district-specific evidence regarding the merits of the additional black VAP majority districts that they proposed. Indeed, they availed themselves of these opportunities and offered expert testimony in an effort to convince the three-judge court that Section 2 required the creation of their proposed districts, and the court admitted this evidence. There is thus no basis for arguing that the court should have received more evidence.[5]

Second, as we have shown, the three-judge court considered this evidence in light of *Gingles*. It applied the three *Gingles* preconditions and found Appellants' proof lacking.

Third, as we have also shown, the three-judge court made the necessary findings and conclusions. Furthermore, the United States' contrary argument ignores the fact that this Court may always examine the record to determine whether the evidence supports the decision below. *Sampson v. Murray*, 415 U.S. 61, 87 n.58 (1974). Our opening brief demonstrated that the record here contains more than enough evidence to sustain the three-judge court's judgment. Sen. Br. at 21-28.

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[5] For the same reason, there is no basis for suggesting that, on remand, the three-judge court should give all parties an additional opportunity to offer evidence on the various Section 2 factors as they apply to pre-1992 elections.

f. The *amicus* brief asks this Court to vacate the judgment and remand the case to the district court. In particular, the United States suggests that this Court "direct the district court to consider in detail . . . *objections raised by any party* on the ground that the court's plans do not comply fully with the requirements of Section 2." U.S. Br. at 9 (emphasis added).[6] This form of relief is different from that sought by the Appellants, who asked only that the Court note probable jurisdiction.

g. Moreover, the remand the United States seeks would not be an appropriate form of relief in any event because it would lead to piecemeal litigation. As noted above, the United States takes no position at this time as to whether the three-judge court should draw additional districts with black VAP majorities. All the United States seeks is a remand with instructions to the court to consider whether its plans comply in all respects with Section 2. U.S. Br. at 19.

Such a remand, however, would leave unanswered the critical question in this case—whether the three-judge court should have created the maximum possible number of districts with black VAP majorities—and would deprive the trial judges of this Court's guidance on this key issue. If the three-judge court then reaffirmed its prior plans, which create less than the maximum possible number of districts with black VAP majorities, the Appellants would undoubtedly appeal again, and once more raise the maximization issue. Conversely, if (contrary

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[6] We do not read this suggestion to encompass congressional redistricting, as the Appellants have raised no objections to it. Sen. Br. at 2 n.1. Even if the United States intends for its objections to be directed to the Congressional as well as the State legislative redistricting, we would note that the Court "do[es] not ordinarily address issues raised only by *amici*." *Kamen* v. *Kemper Fin. Servs., Inc.*, 111 S. Ct. 1711, 1717 n.4 (1991); *see United Parcel Serv., Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981); *Bell* v. *Wolfish*, 441 U.S. 520, 531 n.13 (1979); *Knetsch* v. *United States*, 364 U.S. 361, 370 (1960).

to the statutory language, the legislative history, and the case law) the three-judge court did maximize the number of black majority VAP districts, the Appellees would seek review in this Court. Thus, the inevitable result of the relief the Untied States requests would be another appeal and a concommitant waste of judicial resources.

In short, if there were to be a remand, the proper course would be for this Court to decide the maximization question first, in order better to guide the three-judge court in its consideration of the issues on remand. Indeed, in light of the importance of the question not only to this case but to many other redistricting cases at the congressional, state legislative, and local levels that are pending or will arise in the coming years, this Court should give the question plenary consideration, including full briefing and oral argument. The sounder disposition of this case, however, would be to affirm the judgment below on the ground that, for the reasons stated above and in the Motion to Dismiss or Affirm, the three-judge court ruled correctly on the record before it.

Respectfully submitted,

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